Filed 8/20/18 P. v. Harris CA2/3
Opinion following rehearing

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALONZO HARRIS et al.,<br><br>Defendants and Appellants. | B257675<br><br>(Los Angeles County Super. Ct. No. BA343411) |

APPEAL from judgments of the Superior Court of Los Angeles County, Stephen Marcus, Judge. Harris's appeal is dismissed and all proceedings as to him are ordered permanently abated. Nelson's judgment of conviction is modified and, as so modified, affirmed; sentence vacated and remanded for resentencing.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant Alonzo Harris.

Law Offices of Allen G. Weinberg and Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Floyd Nelson.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants and appellants, Alonzo Harris and Floyd Nelson, appealed their convictions for charges arising out of a series of robberies, attempted robberies and associated crimes. In an unpublished opinion filed on August 29, 2017, we affirmed the judgment as to Harris. As to Nelson, we modified the judgment, affirmed it as modified, and remanded to the trial court for resentencing.

Harris and Nelson petitioned for review of our decision. Among other things, they argued they were entitled to the benefit of newly enacted Senate Bill 620, which became effective on January 1, 2018, and gives trial courts discretion to strike certain firearm enhancements in the interest of justice. Our Supreme Court granted appellants' petitions for review and transferred the matter back to this court with directions to vacate our decision and reconsider the cause in light of Senate Bill 620.

In accordance with that order, we vacated our August 29, 2017 opinion and reconsidered the matter in light of Senate Bill 620. We concluded, as to Nelson, that on remand the trial court had discretion to consider striking the firearm enhancements. As to Harris, we concluded remand was not required because the record made clear the court would not have exercised its discretion to strike the firearm enhancements imposed upon

Harris even had it possessed such discretion at the time of sentencing. On April 10, 2018, Harris petitioned for rehearing, arguing we should allow him to file supplemental briefing on the question of whether remand for resentencing would be futile in his case. On April 11, 2018, we granted Harris's rehearing petition. Harris and the People subsequently filed supplemental briefs.

On July 3, 2018, counsel for Harris notified this court that Harris died on or about May 29, 2018. Counsel has therefore moved to abate proceedings and dismiss Harris's appeal.

We order proceedings permanently abated, and the appeal dismissed, as to Harris. As to Nelson, in accordance with the Supreme Court's order, we vacate our August 29, 2017 opinion and reconsider the matter in light of Senate Bill 620. Our decision regarding Nelson's previously raised claims of error remains the same. On remand, however, the trial court has discretion to consider striking the firearm enhancements imposed on Nelson.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

Viewed in accordance with the usual rules of appellate review (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303–1304), the evidence established the following.

a. *Harris's crimes between October 2007 and May 2008*

Between October 7, 2007, and December 31, 2007, Harris, with his accomplice Glenn Boldware, committed a series of robberies or attempted robberies and associated crimes at nine Los Angeles area stores, namely Anawalt Lumber, Big Lots, two 99 Cents Only Stores, Whole Foods, two Trader Joe's stores,

Smart and Final, and Washington Square Market. On January 4, 2008, Boldware was shot and killed by Los Angeles police officers. Thereafter, between May 10, 2008 and May 29, 2008, Harris committed additional robberies or attempted robberies and associated crimes at three other locations: a Goodyear Tire store, the Lodge Steakhouse, and Best Buy Market.

b. *The investigation*

Detective Tracey Benjamin began investigating the commercial robberies, which had been nicknamed the "The Morning Masked Bandits" case, in November 2007. From video surveillance footage and information provided by one of the victims, Benjamin linked Boldware's Dodge Magnum to the offenses. A search of the car revealed a variety of items that appeared to be connected to the crimes, including a stocking cap, a knit cap, cotton gloves, latex gloves, a nylon stocking tied in a knot, a beanie with eyeholes cut out, and several varieties of rope. Blue rope with a yellow design appeared identical to that used by the perpetrators in the Washington Square Market offenses. Other pieces of rope appeared identical to that used in the Trader Joe's offenses. A search of Boldware's house, pursuant to a warrant, revealed more rope. Analysis of Boldware's cellular telephone data led to the identification of Harris as a suspect.

Beginning in May 2008, a team of detectives began a 27-day surveillance of Harris. On 12 of those days, Harris spent time with Nelson, visiting over 60 different businesses. Nelson and Harris appeared to be casing the businesses, rather than shopping. For instance, on June 1, 2008, Harris picked up Nelson at about 9:15 p.m. and drove to a CVS Pharmacy in Los Angeles, where the men remained parked for a few minutes

before driving off. They then drove to a Jon's Market in North Hollywood, where they remained for five minutes. Next, the duo drove to a CVS Pharmacy on Ventura Boulevard, and then to a Best Buy store in Van Nuys, where they remained for approximately three minutes. Around 11:40 p.m., they drove back to the Jon's Market in North Hollywood, parked, and walked around, departing after 15 minutes. This was followed by a drive to a Gelson's market in Valley Village, where Harris walked around the parking lot and watched the market's front entrance as he crawled around some bushes. The men then drove to a Vallarta market in North Hollywood, a Ralph's market on Laurel Canyon, and then to a 99 Cents Only Store in North Hollywood, where they sat in the parking lot for almost an hour. At about 3:00 a.m., defendants drove to a Smart & Final store in North Hollywood, parked for about 12 minutes, drove to a small market, and then returned to one of the CVS pharmacies. At 4:45 a.m., they drove to a Smart & Final store in East Los Angeles, a Vallarta market, a Top Value market, Steven's Steakhouse, a Pep Boys store, and finally — at 6:15 a.m. — a Stater Brother's market. The surveillance team observed similar excursions undertaken by Nelson and Harris on other dates.

c. *Lawry's Prime Rib restaurant attempted robbery*

Starting at about midnight on July 11, 2008, the surveillance team followed Harris and Nelson to various stores: a K-mart, a Vallarta market, a Gelson's market, a Marshall's store, and finally, at approximately 5:30 a.m., a Lawry's Prime Rib restaurant located in Beverly Hills. The restaurant was not open for business at the time. Walter Eckstein was inside the restaurant, working as the executive chef. When a restaurant worker briefly exited the restaurant and then went back inside,

Harris and Nelson entered the restaurant through the same door. Nelson was clad in a navy blue hoodie and dark pants, and was carrying a black duffel bag. Harris was wearing a black hoodie and light colored pants. Harris and Nelson came back out of the restaurant in under a minute and hid behind some dumpsters. After waiting approximately one minute, they went back inside the restaurant. Inside, Eckstein observed one of them come through the door, holding a gun; the other grabbed Eckstein from behind and put a gun to his forehead. Eckstein was ordered to open the safe, but he said he could not. Harris and Nelson forced Eckstein to lie on the floor and one of them tried to tie his hands, but failed. Harris and Nelson exited the restaurant and ran to Harris's truck. Nelson threw a black bag into the back of the truck, and the men drove off.

Police officers stopped Harris's truck shortly thereafter. Harris pointed a firearm at an officer and a gunfight ensued, during which Nelson was injured and the defendants were arrested. Harris had a handgun in his waistband. In the bed of the truck, police found a black bag with 10 zip ties and a second handgun. Inside the truck's passenger compartment police found a bag containing a pair of gloves; three black half-masks that would "cover[ ] the lower portion of the face," a black hoodie sweatshirt, black and white zip ties, and more gloves. Officers discovered paperwork bearing Nelson's name on the front passenger seat.

In a field show-up conducted approximately an hour after the incident, Eckstein stated that Harris and Nelson appeared to be the same size as the assailants, and their clothing was similar to that worn by the assailants; however, he could not identify the men as the perpetrators because he had not seen their faces.

2. *Procedure*

Both Harris and Nelson were convicted of conspiracy to commit robbery, attempted robbery, and possession of a firearm by a felon (Pen. Code,[1] §§ 182, 211, 664, & former § 12021). In addition, Harris was convicted of six additional counts of attempted robbery, five counts of assault with a firearm, seven counts of robbery, 14 counts of false imprisonment by violence, sexual battery by restraint, and one additional count of possession of a firearm by a felon (§§ 664, 211, 245, 236, 243.4, & former § 12021). As to both defendants, the jury found true personal firearm use, prior serious felony conviction, and prior prison term allegations. (§§ 12022.5, 12022.53, 667, subds. (a)–(i), 667.5.) Harris was sentenced to prison for a term of 620 years to life, and Nelson was sentenced to prison for a term of 50 years to life.

**CONTENTIONS**

Harris originally raised claims of evidentiary error, prosecutorial misconduct, erroneous denial of his new trial motion brought on the ground his trial counsel was ineffective, and cumulative error. However, his counsel has moved to permanently abate proceedings and dismiss Harris's appeal in light of his recent death.

Nelson, joining in an argument originally made by Harris,[2] contends the trial court erred by denying appellants' motion to suppress evidence obtained through use of a GPS tracking device

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] In light of Harris's death and dismissal of his appeal, for convenience we treat this argument as if made originally by Nelson.

affixed to Harris's vehicle. He further avers that his sentence was improperly enhanced with two prior serious felony conviction findings under section 667, subdivision (a), and the matter must be remanded to allow the trial court to exercise its discretion and determine whether to strike or dismiss the firearm enhancements.

**DISCUSSION**

1. *Abatement of proceedings and dismissal of Harris's appeal*

On July 3, 2018, counsel for Harris informed this court that Harris died in prison on or about May 29, 2018. Harris's death renders his appeal moot and all proceedings as to him must be permanently abated. (*In re Sheena K.* (2007) 40 Cal.4th 875, 879, 893.) Accordingly, we order Harris's appeal dismissed. (*Id.* at p. 893; *People v. Smith* (1994) 21 Cal.App.4th 942, 951.)

2. *The motion to suppress evidence was properly denied*

Nelson contends the trial court erred by denying defendants' motion to suppress evidence obtained when the police secretly affixed a GPS tracking device to Harris's truck without a search warrant. We conclude the trial court properly denied the suppression motion because the police were acting in good faith reliance on the state of the law at the time.

a. *Standard of review*

"The Fourth Amendment provides '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . .' (U.S. Const., 4th Amend.) This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and is applicable to the states. [Citation.] A similar guarantee against unreasonable government searches is set forth in the

state Constitution (Cal. Const., art. I, § 13) but, since voter approval of Proposition 8 in June 1982, state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard. [Citations.] 'Our state Constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court.' [Citation.]" (*People v. Camacho* (2000) 23 Cal.4th 824, 829–830, fn. omitted.)

A reviewing court must uphold the trial court's factual findings if they are supported by substantial evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301, disapproved on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.) "The question of whether a search was unreasonable, however, is a question of law. On that issue, we exercise 'independent judgment.' [Citations.]" (*People v. Camacho*, *supra*, 23 Cal.4th at p. 830.)

b. *Factual background*

At the suppression hearing, Detective David Friedrich testified that between May and July, 2008, he participated in an undercover surveillance effort aimed at defendant Harris. Sometime after May 30, he placed a battery-powered GPS tracking device on Harris's pickup truck while it was parked on a public street. At the time Friedrich affixed the device, his understanding of the existing state of the law was that police were permitted to place such a device on a vehicle without a search warrant if the affixing was done in a public place. He had been trained that a search warrant was required only if he

hardwired the device to the vehicle, e.g., by powering the GPS device from the vehicle's own battery.

Asked if the GPS device had "recording capabilities," the following colloquy occurred:

"The witness: The GPS device has a memory that we use [but] . . . none of the movements [ ] the vehicle made were saved.

"By Mr. Nelson:

"Q. Is there any reason why they weren't made or saved?

"A. We utilize the GPS in our surveillance . . . just to locate the vehicle to begin physical surveillance of the pickup [truck], and that was the only reason why we utilized the device, so we can come in in the afternoon, and if the car wasn't there, we weren't wasting our time waiting for the vehicle to show back up on [*sic*] the house. [¶] We would just dial it up and then respond to the location of the vehicle and begin a physical surveillance."

Detective Friedrich could not recall specifically who made the decision to install the GPS device on Harris's truck, but he thought it had probably been Detective Benjamin, who was in charge of the case.

Friedrich testified the device had to be replaced "a few times." Each time, the truck was in a public place.

The trial court denied defendants' suppression motion because at the time the GPS device was used in this case, the United States Supreme Court had not yet decided *United States v. Jones* (2012) 565 U.S. 400 [132 S.Ct. 945] (*Jones*), which held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " (*Id*. at p. 404, fn. omitted.) Prior to that time, controlling precedent in California allowed tracking devices to be placed on the underside of vehicles without

a warrant because "installing an electronic tracking device on the undercarriage of defendant's truck did not amount to a search within the meaning of the Fourth Amendment." (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 953 (*Zichwic*).) The trial court concluded that Friedrich's testimony was credible and that he had acted in reasonable good faith.

c. *Discussion*.

In 2012, the United States Supreme Court in *Jones* "held that the government's attachment of a GPS tracking device to the defendant's vehicle and use of that device to monitor the vehicle's movements on public streets was a search within the meaning of the Fourth Amendment and thus required a warrant."[3] (*People v. Mackey* (2015) 233 Cal.App.4th 32, 94 (*Mackey*).) "*Jones* changed the law in California. Prior to *Jones,* California state courts and the Ninth Circuit had held that installation of a GPS device by law enforcement authorities was not a search governed by the Fourth Amendment because a vehicle operator had no reasonable expectation of privacy in a vehicle's exterior. [Citations.]" (*Id*. at p. 95.)

"[N]ewly announced rules of constitutional criminal procedure must apply 'retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception.' [Citation.]" (*Davis v. United States* (2011) 564 U.S. 229, 243 [131 S.Ct. 2419] (*Davis*).) However, "*Evidence obtained during a*

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[3] *Jones* concluded a Fourth Amendment search occurred because the "[g]overnment physically occupied private property for the purpose of obtaining information." (*Jones*, *supra*, 565 U.S. at p. 404.)

*search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule*." (*Id.* at p. 241, italics added.)[4]

Detective Friedrich installed the GPS transmitter in 2008, before *Jones* was decided. At that time, the binding California appellate precedent was *Zichwic*, which held that placement of an electronic tracking device on the undercarriage of a vehicle, by an officer who was in a place where he or she had a right to be, did not constitute a search and, therefore, did not require a search warrant. Hence, the question becomes whether using the GPS device in this case is entitled to the objective good faith exception set forth in *United States v. Leon*, *supra*, 468 U.S. 897 [104 S.Ct. 3405]. (See *People v. Macabeo* (2016) 1 Cal.5th 1206, 1219–1220.)

This issue has already been squarely addressed by *Mackey*, where an Oakland Police officer placed a GPS tracking device on

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[4] "Our retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a *potential* ground for relief. Retroactive application . . . lifts what would otherwise be a categorical bar to obtaining redress for the government's violation of a newly announced constitutional rule. [Citation.] Retroactive application does not, however, determine what 'appropriate remedy' (if any) the defendant should obtain. [Citation.]. . . . As a result, the retroactive application of a new rule of substantive Fourth Amendment law *raises* the question whether a suppression remedy applies; it does not answer that question. See [*United States v.*] *Leon* [(1984)] 468 U.S. [897,] 906 [104 S.Ct. 3405] ('Whether the exclusionary sanction is appropriately imposed in a particular case . . . is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct" ')." (*Davis*, *supra*, 564 U.S. at pp. 243–244.)

the defendant's vehicle without a warrant in 2007 (i.e., five years before *Jones* was decided). The device was battery-operated and was installed while the vehicle was parked in a public place. The device sent signals that could be tracked in real-time through the Internet. (*Mackey*, *supra*, 233 Cal.App.4th at pp. 93–94.) At the suppression hearing, the prosecutor cited *Zichwic* and argued the officer had acted in good faith reliance on case law at the time allowing him to install the device without a warrant. The trial court agreed that affixing a GPS device to the exterior of the vehicle did not violate the defendant's Fourth Amendment rights. (*Mackey*, at pp. 94–95.) On appeal, the Court of Appeal affirmed the denial of the suppression motion, finding that the "holding in *Zichwic* was [the] binding California precedent upon which the police could reasonably rely in 2007, when they installed a GPS device on [the defendant]'s vehicle." (*Id.* at p. 96.) As in *Mackey*, here it was objectively reasonable for the police in 2008 to rely on *Zichwic* as the basis for affixing the GPS device to Harris's truck without a search warrant.

Nelson argues the prosecution failed to produce sufficient evidence at the suppression hearing to establish a *Leon* good faith exception because Detective Friedrich testified he was not the actual "decision-maker," i.e., he had been ordered by a superior officer to affix the device to Harris's truck. But the guiding test is objective, not subjective: "[W]e hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." (*Davis*, *supra*, 564 U.S. at p. 232; see also *People v. Willis* (2002) 28 Cal.4th 22, 33 ["the good faith exception . . . is an objective one; [it] does not turn on the subjective good faith of individual officers"]; *United States v. Sparks* (1st Cir. 2013) 711 F.3d 58, 66, fn. 6 ["we do not believe

. . . that *Davis* requires the government to show actual, as well as objectively reasonable, reliance"].)

Nelson also argues *Zichwic* did not constitute binding appellate authority because the defendant there "claimed a Fourth Amendment search violation based only on the installation of the tracking device. In contrast, appellant here argued the warrantless attachment of the device and the ensuing prolonged monitoring was constitutionally prohibited." But this argument is misleading because the defendant in *Zichwic* in effect conceded he would lose on the monitoring argument given the state of the law at that time: "We observe that it is a separate question whether monitoring signals from a tracking device is a search. [Citation.] The United States Supreme Court has concluded that monitoring electronic signals does not amount to a search when the only information provided is what could be obtained through visual surveillance, such as the movements of an automobile on public thoroughfares. (*United States v. Knotts* (1983) 460 U.S. 276, 281–282, 285 [103 S.Ct. 1081, 1085, 1087].) Monitoring does amount to a search when it reveals information about otherwise hidden activities inside a residence. (*United States v. Karo* (1984) 468 U.S. 705, 715 [104 S.Ct. 3296, 3303].) In our case, monitoring the tracking device simply revealed the movements of defendant's truck on city streets." (*Zichwic*, *supra*, 94 Cal.App.4th at p. 956; see *United States v. Sparks*, *supra*, 711 F.3d at p. 67 ["[A]t the time of the search in this case, *Knotts* was widely and reasonably understood to stand for the proposition that the Fourth Amendment simply was not implicated by electronic surveillance of public automotive movements, because the latter was merely a more efficient 'substitute . . . for an activity, namely following a car on a public street, that is

unequivocally *not* a search within the meaning of the amendment.' [Citations.] (Italics added.)"]; *United States v. Pineda-Moreno* (9th Cir. 2012) 688 F.3d 1087, 1090 ["T]he agents attached and used the mobile tracking devices . . . in objectively reasonable reliance on then-binding precedent. In 2007, circuit precedent held that placing an electronic tracking device on the undercarriage of a car was neither a search nor a seizure under the Fourth Amendment. [Citation.] Circuit law also held that the government does not violate the Fourth Amendment when it uses an electronic tracking device to monitor the movements of a car along public roads. [Citations.]".)

Nelson further argues that section 637.7, enacted in 1998, negates any good faith exception to imposition of the exclusionary rule. But this statute says, in relevant part: "(a) No person or entity in this state shall use an electronic tracking device to determine the location or movement of a person. [¶] . . . [¶] (c) *This section shall not apply to the lawful use of an electronic tracking device by a law enforcement agency*." (Italics added.) Not only do the very terms of the statute contradict this argument, but *Mackey* rejected it: "Defendants further claim the exact rationale *Zichwic* relied on—that defendant did not have a reasonable expectation of privacy—had been, in their words, 'explicitly rejected as the policy of this state' by the Legislature's enactment of section 637.7. The introductory section of the enacting legislation included the statement that 'electronic tracking of a person's location without that person's knowledge violates that person's reasonable expectation of privacy.' (Stats. 1998, ch. 449, § 1.) . . . . [¶] [But the] legislative statement referred to does no more than establish a general statewide policy. It cannot define the scope of the exclusionary rule in

California. That definition is contained within the '[t]ruth-in-[e]vidence' provision of the California Constitution (art. I, § 28, subd. (f)(2) [formerly subd. (d)]), which prohibits application of the exclusionary rule to evidence gathered in violation of state law unless exclusion is compelled by the federal Constitution. [Citation.]" (*Mackey*, *supra*, 233 Cal.App.4th at p. 97, fn. omitted.)

We conclude the trial court properly denied the motion to suppress evidence gathered by the GPS device in this case.

3. *Nelson's sentence was improperly enhanced by prior conviction allegations added after the jury was discharged.*

Nelson contends the trial court erred by sentencing him on two out of three prior serious felony conviction enhancements (§ 667, subd. (a)) because they were not "brought and tried separately." This claim is based, in turn, on Nelson's contention that the trial court erred by letting the People amend the information to add additional prior conviction allegations after the jury had already been discharged. The Attorney General properly concedes that the latter claim has merit, but then argues, inconsistently, that the former claim is incorrect. We conclude that Nelson's sentencing claim has merit, and order that two of the five-year enhancements imposed under section 667, subdivision (a), be stricken.

The amended information alleged that Nelson had sustained a number[5] of prior serious felony convictions under

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[5] We find the parties' counting of these priors to be confusing. Both parties assert there were three such priors charged. However, next to the second degree robbery conviction, the amended information says "(3 cts.)," and next to the aggravated assault conviction the amended information says

section 667, subdivision (a), which provides for "a five-year enhancement for each such prior conviction on charges brought and tried separately." (§ 667, subd. (a)(1).) According to the amended information, all of these priors arose out of the same 1992 judgment in superior court case number BA014699. After Nelson's jury was discharged, and over his objection, the trial court allowed the People to amend the information a second time to allege additional prior convictions under two other superior court cases: a 1981 judgment in case number A081445, and a 1978 judgment in case number A444411. According to the Attorney General, the reason for this second amendment was that "the prosecutor . . . failed to review [Nelson's section 969b prison packet] adequately."

As the Attorney General rightly concedes, it was improper for the trial court to allow the prosecution to amend the information to add additional prior conviction allegations *after* the jury had already been discharged. As stated by the Supreme Court in *People v. Tindall* (2000) 24 Cal.4th 767, "[s]ection 1025, subdivision (b) provides, in pertinent part: 'the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . .' Section 969a, however, states that prior conviction allegations may be added '[w]henever it shall be discovered that a pending indictment or information does not charge all prior felonies . . . .' We interpreted section 969a to permit the prosecution, on order of the court, to amend the information until

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"(6 cts.)." Hence, where the parties count only three section 667, subdivision (a), allegations, it appears that nine such priors may have been charged, albeit all stemming from the same superior court case.

sentencing so long as the court has not discharged the jury. [Citations.] Notwithstanding section 969a, defendant argues that section 1025, subdivision (b), prohibits the prosecution from amending the information to allege prior convictions after the jury that decided the guilt issue has been discharged. For reasons that follow, we agree." (*Id.* at pp. 771–772, fn. omitted; accord, *People v. Gutierrez* (2001) 93 Cal.App.4th 15, 24 ["The trial court acted in excess of jurisdiction in allowing the prosecution to file a late, amended information alleging the Nevada state robbery conviction as a strike prior and as a five-year enhancement."].)

Hence, we agree with Nelson that the additional prior serious felony conviction findings arising from the allegations added to the information after his jury was discharged must be vacated.

Nelson next contends that his sentence must be corrected because, as part of his prison term of 50 years to life, the trial court included 15 years for three section 667, subdivision (a), priors, but should have only punished him for one five-year enhancement. We agree. "[T]he requirement in section 667[, subdivision (a)] that the predicate charges must have been 'brought and tried separately' demands that the underlying proceedings must have been formally distinct, from filing to adjudication of guilt. Here, as the record plainly reveals, the charges in question were not 'brought . . . separately,' but were made in a single complaint." (*In re Harris* (1989) 49 Cal.3d 131, 136; *People v. Deay* (1987) 194 Cal.App.3d 280, 286 ["Charges brought and tried 'separately' for purposes of section 667 means simply that prior formal proceedings leading to multiple adjudications of guilt must have been totally separate"].)

The Attorney General argues Nelson is wrong because the priors stemming from case numbers A444411 and A081445 were brought and tried separately from the prior stemming from case number BA014699. But it is the Attorney General who is incorrect because, as discussed *ante*, the trial court erred by adding the prior allegations from case numbers A444411 and A081445 after the jury had already been discharged. Therefore, the two prior enhancements stemming from case numbers A444411 and A081445 must be stricken.

However, because—in addition to the 50-years-to-life term Nelson received on count 1 (for attempted robbery)—the trial court also sentenced him to a concurrent term of six years on count 3 (for possession of a firearm by a felon), it is appropriate to remand this matter so the trial court may consider restructuring Nelson's sentence. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256 ["the trial judge's original sentencing choices did not constrain him or her from imposing any sentence permitted under the applicable statutes and rules on remand, subject only to the limitation that the aggregate prison term could not be increased"]; *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614 [remand for resentencing proper where original sentence contained unauthorized enhancement]; *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1455–1458 [remand for resentencing proper where original sentence violated "double-the-base-term" rule].)

4. *Remand for consideration of amended sections 12022.5 and 12022.53 (Senate Bill 620)*

As noted, after we filed our original opinion in this matter, our Supreme Court granted review and remanded this matter to us with directions to reconsider the cause in light of Senate Bill 620. When Nelson was sentenced, imposition of section 12022.5

and 12022.53 enhancements was mandatory and the trial court lacked discretion to strike them. (See former § 12022.5, subd. (c), Stats. 2011, ch. 39, § 60; former § 12022.53, subd. (c), Stats. 2010, ch. 711, § 5; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.) Effective January 1, 2018, the Legislature amended sections 12022.5 and 12022.53 to give trial courts authority to strike firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, §§ 1, 2.) As amended, section 12022.5 provides in pertinent part: "(c) The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." Section 12022.53 was amended to add the same language. (§ 12022.53, subd. (h).)

The amendments to sections 12022.5 and 12022.53 apply to cases, such as Nelson's, that were not final when the amendment became operative. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091.) Under *In re Estrada* (1965) 63 Cal.2d 740, we presume that, absent contrary evidence, an amendment reducing punishment for a crime applies retroactively to all nonfinal judgments. (*Id.* at p. 745; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306.) The *Estrada* rule has been applied to penalty enhancements, as well as to amendments giving the court discretion to impose a lesser penalty. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792; *People v. Francis* (1969) 71 Cal.2d 66, 75–76.)

Here, Nelson was sentenced to an additional 10 years on count 2 for his personal use of a firearm pursuant to section

12022.53, subdivision (b). He was also sentenced to a 10-year term under section 12022.5, stayed pursuant to section 654. Amended sections 12022.5 and 12022.53 may retroactively be applied in Nelson's case. Additionally, both statutes expressly state that the trial court has discretion to strike enhancements imposed pursuant to those subdivisions when resentencing occurs pursuant to any other law. This language suggests the amendment applies to crimes committed prior to the amendment's effective date, that are now before the court for resentencing for other reasons. As discussed, this matter must be remanded for resentencing in any event. Accordingly, on remand, the trial court has discretion, under amended sections 12022.5 and 12022.53, to consider whether or not to strike the firearm enhancements. We offer no opinion on how the court's discretion should be exercised.

## DISPOSITION

Proceedings in Harris's case are ordered permanently abated, and the Clerk of the Superior Court is directed to enter an order to that effect in case No. BA343411. His appeal is dismissed.

As to Nelson, the true findings on two of the section 667, subdivision (a) enhancements are vacated and the associated enhancements are ordered stricken, the sentence is vacated, and the matter is remanded for resentencing in accordance with the opinions expressed herein. In all other respects, Nelson's judgment of conviction is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.